No. 16

IN THE

Supreme Court of the United States

October Term, 1957.

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

I.

UNDER THE GUISE OF INTERPRETATION, THE COMMISSION HAS DEPRIVED APPELLANT OF OPERATING RIGHTS GUARANTIED BY THE GRANDFATHER CLAUSE OF PART II OF THE INTERSTATE COMMERCE ACT.

The Government argues that the only issue in this case is the correct construction of the permit issued to appellant's predecessor (Nelson) in 1942 and that its interpretation deprives appellant of no rights since it only declares what those rights were "from the beginning." (Br. 7, 11.) This argument ignores the basic difference between the operating rights Nelson acquired primarily under the

grandfather clause of Part II of the Interstate Commerce Act, and only secondarily under the 1942 permit, which was required by statute to reflect those rights.

A. The Commission erred in refusing to consider evidence of Nelson's grandfather operations.

Section 209(a) of the Act commanded the Commission to issue to grandfather carriers permits granting substantial parity between past and prospective operations "without further proceedings." (Govt. Br., Appendix, 34.) *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). The statute then clearly distinguished grandfather carriers from new applicants by providing: "Otherwise the application * * * shall be decided in accordance with the procedure provided for in paragraph (b) * * *." (Govt. Br., Appendix, 34.)

Section 209(b) required new applicants to satisfy the Commission, *inter alia*, that their proposed operations would be consistent with the public interest and the national transportation policy. (Govt. Br., Appendix, 35.)

Therefore, while the Commission had considerable discretion in granting or denying permits to new applicants and in defining the scope of operations authorized by such permits, it had no discretion in dealing with grandfather carriers; once the scope of their operations was established, their permits were required to mirror those operations. *United States* v. *Maher*, 307 U.S. 148, 153 (1939); *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488 (1942); *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 499 (1939) (concurring opinion). For the purposes of this case, it is most important to bear in mind that a grandfather carrier is entitled to continue the same operations regardless of whether or not the language of his permit was aptly chosen to describe those operations. As the court said in *Seatrain Lines* v. *United States*, 64 F. Supp. 156, 161 (Dela. 1946), affirmed, 329 U.S. 324 (1947):

> The phraseology of the certificate cannot serve, of course, to impair Seatrain's rights under the grandfather clause * * *.

Therefore, although the Commission is free to interpret a certificate or permit granted to a new applicant, subject only to the rule that its interpretation may not be clearly erroneous, its duty does not stop there when a grandfather carrier's permit is involved.[1] In such a case, even if the Commission's interpretation of the permit's language is correct, as a matter of semantics, it cannot order the grandfather carrier to cease operations which may violate the permit, as interpreted, but which are nevertheless within the scope of the grandfather operations which the permit was required to reflect. *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505, 506 (1954). However, in this case, the Commission disregarded the fact that the primary source of appellant's rights was the grandfather clause, not the Commission's largess, and openly refused to consider any events prior to the issuance of the 1942 permit on the ground that the permit contained no patent ambiguity[2] (R. 237), despite the fact that both appellant and the Bureau of Inquiry and Compliance introduced considerable evidence of such events (Appellant's Br. 8-9).

We are aware of only two other cases in which the Commission refused to consider evidence of grandfather operations which the carrier claimed would show that the operations in question were authorized regardless of the Commission's current interpretation of his permit or certificate; and in both cases the Commission's orders were set aside by three-judge district courts. In *Bird Trucking Co. Modification of Certificate*, 53 M.C.C. 703 (1952), a grandfather

[1] *Willers* v. *United States*, 123 F. Supp. 270 (D.S.D. 1955), upon which the Government so heavily relies (Br. 13), involved a permit issued to a new applicant, not to a grandfather carrier.

[2] As we pointed out in our brief (p. 37, note 29), the Commission is never reluctant to find sufficient ambiguity to warrant examination of grandfather evidence which sustains its position.

carrier's successor sought to have the commodity authorization in its certificate enlarged from "groceries" to commodities dealt in by wholesale and retail grocery houses. (After the certificate had been issued, the Commission began defining "groceries" to mean only edibles, except fresh meat.) In support of his position, the carrier introduced proof of the underlying grandfather operations to show that a variety of non-edible commodities commonly sold in grocery stores had been transported. The Commission held that the evidence was not sufficiently definite to authorize the requested modification except with respect to dog food, household washing and cleaning supplies, and household paper products. However, the district court remanded because of the Commission's failure to give adequate consideration to *all* of the grandfather evidence offered. *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955). The court agreed that the interpretation of the language of a certificate is normally for the Commission to determine and that its determination should not be overturned unless clearly erroneous—and for these reasons agreed that the Commission's interpretation of "groceries" to mean edibles only was correct. Nevertheless, the court held that this definition could not be applied to a certificate issued before it was adopted and at a time when the grandfather carrier had a right to assume that "groceries" fairly comprehended all of the non-edibles he had been transporting during the grandfather period.

Similarly, in *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission ordered a grandfather carrier to cease transporting "factory materials" under a permit which authorized the transportation only of "factory supplies." (The Commission, subsequent to the issuance of the permit, began to draw a distinction between commodities which are used in operating a factory (supplies) and

those which are used as components of the manufactured product (materials).). However, the district court remanded because of the Commission's failure to consider grandfather evidence. *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954). The Commission made the same argument that it makes here, viz.: that it had only interpreted the language of one of its permits and that its interpretations are not to be disturbed unless clearly erroneous. The court agreed with these truisms but held that the real issue was not the abstract meaning of the word "supplies", as a matter of semantics, but the meaning of that word as used in Salvino's permit, and that the Commission's interpretation could not stand if it violated a right granted to him by the Interstate Commerce Act. Id. at 281-282. The Commission also argued that consideration of grandfather evidence was unnecessary because the permit was unambiguous, but the court held that the language of the permit was ambiguous when considered in the light of the circumstances under which it was issued. Id. at 283-284.

The Government attempts to distinguish the *Bird* and *Salvino* cases on the ground that, in each case, both parties contended that the commodity description was ambiguous and presented conflicting evidence in support of their divergent interpretations.[3] (Br. 14.) The Government also points out that, in the *Salvino* case, the Commission had decided the case on a theory different from that on which it had been tried, by stipulation, thus denying the opportunity to present appropriate evidence. However, these grounds do not distinguish the *Bird* and *Salvino* cases for the purposes for which they have been cited by appellant, viz.: to

[3] The opinions do not support this statement. So far as the Commission's opinion in the *Bird* case shows, only the grandfather carrier's successor introduced grandfather evidence. In the *Salvino* case, Salvino, before the hearing examiner, took the position that his permit was unambiguous and that there was no occasion to consider evidence of events underlying the issuance of the permit; he introduced such evidence only to rebut evidence introduced by the complainants. *Salvino* v. *United States*, 119 F. Supp. 277, 282-283, (W.D. Wash. 1954).

show that the Commission has no right to deprive a grandfather carrier of his statutory rights by pretending to interpret the language of his permit, while refusing to consider evidence of the underlying grandfather operations.

B. Appellant is not estopped to complain of the Commission's failure to consider evidence of Nelson's grandfather operations.

The Government argues that appellant is estopped to complain of the Commission's failure to consider evidence of Nelson's grandfather operations because its counsel, before the hearing examiner, took the position that its permit was unambiguous and that evidence of underlying events could not therefore be considered. (Br. 15-16.)

Appellant's position before the hearing examiner, as well as before this Court, has always been that its permit is clear and unambiguous and that, properly interpreted, it authorizes the transportation in question; however, if it should be held ambiguous or if the Commission's intended use interpretation of the language of the permit should be sustained, the Commission must consider the underlying grandfather evidence either to resolve the ambiguity or to show that its interpretation deprives appellant of grandfather rights. (R. 50-52, 114-116; Appellant's Br. 37.) The Government's extract of appellant's counsel's statements before the hearing examiner is not complete and is taken out of context. (Br. 15-16.)

It should be noted that all of the cases cited by the Government to support its estoppel argument involved situations where the points sought to be raised before the reviewing courts had never been presented to or passed on by the Commission. Here, appellant complained of the hearing examiner's failure to consider all of the underlying grandfather evidence in its first and fourth exceptions to the examiner's report, but the Commission overruled those exceptions. (R. 235, 237.)

If there is any estoppel in this case, it should be applied against the Commission. Before the hearing examiner the Commission's Bureau of Inquiry and Compliance, armed with certain documents carefully selected from the record in the grandfather proceeding to support its restrictive interpretation of the permit, took the position that the permit was ambiguous; however, after the hearing, during which Nelson uncontrovertedly testified as to the true scope of his grandfather operations, the Bureau switched its position and claimed that such evidence could not be considered because the permit was unambiguous. (See Appellant's Br. 39.)

C. The grandfather evidence which the Commission refused to consider unequivocally shows that the Commission has deprived appellant of vested grandfather rights.

The Government argues that, if the phrase "*stock* in trade of drug stores" in appellant's permit is ambiguous, the ambiguity should be resolved only by considering the documentary evidence which was before the Commission when it was issued.[4] (Br. 17-18, 19-22.)

This argument, like the rest, assumes that the only question in this case is the construction of the 1942 permit, whereas we believe it is clear that grandfather evidence must be considered not only as an aid to construction, but also to determine whether or not the Commission's construction deprives appellant of his statutory grandfather rights. For the latter purpose, the Commission must necessarily consider not only the documentary evidence before it in the grandfather proceeding, but all available evidence of the true scope of Nelson's grandfather operations.

However, even if the only question here were the interpretation of the 1942 permit, it would be improper to

[4] It must be remembered that the Commission refused to consider *any* of the events prior to the issuance of the 1942 permit. (R. 237.) Its present argument that some, but not all, of those events should be considered to resolve any ambiguity is inconsistent with its holding.

consider only the documentary evidence before the Commission when the permit was issued because of Nelson's uncontroverted explanation of why that evidence did not accurately reflect the true scope of his operations. (Appellant's Br. 10-13.) To summarize: It is true, as the Government states (Br. 10-13) and as we conceded (Br. 10-11), that the documentary evidence (except the N.R.A. Certificate of Registration which described Nelson as an "ANYWHERE FOR HIRE Member of the Trucking Industry"[5] (R. 229)) indicates that Nelson was transporting merchandise only for Walgreen Drug Stores during the grandfather period. However, as Nelson explained, this was because the Commission's District Supervisor, Petritz, told Nelson that it was necessary, in order to get the kind of permit he wanted, i.e. a contract carrier permit to transport store fixtures, miscellaneous merchandise,[6] and household furniture, to show only *one* contract and that, after the permit was granted, he could substitute any number of contracts with different persons. Appellant does not claim that Nelson was misled by Petritz, as the Government states (Br. 30), but that Petritz properly advised Nelson

[5] N.R.A. registration was required to be considered as evidence of bona fide operation in connection with the issuance of the grandfather permit. Interstate Commerce Act, Part II, Sec. 209(a). It is significant that the Bureau of Inquiry and Compliance did not include Nelson's N.R.A. certificate in the group of carefully selected exhibits which it introduced to support its position before the hearing examiner. (I.C.C. Ex. 1; R. 53, 215-220.)

[6] The Government points out that Nelson's application showed that the miscellaneous merchandise he had been transporting was for the Walgreen Company and that these were classified as "special commodities", not "commodities generally". (Br. 22, note 4.) Perhaps this is why the Commission found, in its 1938 compliance order, that Nelson had been transporting "commodities indicated" as, *inter alia*, "*stock* in trade of drug stores". (I.C.C. Ex. 5; R. 215, 230-231.) If so, "*stock*" must have been intended to mean the same as "miscellaneous merchandise" and "in trade of drug stores" was intended only to indicate the difference between "commodities generally" and "special commodities". It is significant that such a special commodity description carries its own inherent limitations, unlike the extremely broad commodity descriptions, such as "contractors' materials, supplies, and equipment", "farm supplies", "doctor's, dentist's, and hospital supplies and equipment", etc., upon which the Commission has successfully imposed an implied intended use limitation (Appellant's Br. 26, note 20) and upon which precedents the Government relies (Br. 24-25).

according to the law as it was then understood by the Commission itself. In *Longshore Contract Carrier Application*, 2 M.C.C. 480, 481 (1937), the Commission stated:

> Under section 209(b) of the Motor Carrier Act, 1935, we are without authority to attach any terms, conditions, or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit.

It was not until *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), that the Commission abandoned this construction and developed the technique of limiting broad commodity descriptions by imposing restrictions as to the particular shippers or class of shippers for whom the commodities described could be transported. See Commissioner Lee's dissent in the *Keystone* case, at p. 501, where he points out that "the majority, for the first time, departs from our well-established policy."

Nelson's explanation is further corroborated by the fact that, after his application was submitted, the Commission's agents inspected his business and were shown a large number of delivery tickets indicating the transportation of a variety of commodities for many shippers other than drug store owners.[7] Therefore, Petritz must have been aware of the full scope of Nelson's grandfather operations, but chose to reflect only the Walgreen carriage because of his understanding that it was necessary to show only one contract to qualify Nelson for a contract carrier's permit.

Under these circumstances, it would be a gross distortion to consider only the documentary evidence before the Commission in the grandfather proceeding either as an aid to the interpretation of Appellant's permit or as conclusive of the scope of Nelson's grandfather operations.

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[7] The Government, somewhat misleadingly, states (Br. 3): "No receipts indicating any other carriage [except for Walgreen] were submitted."

It is significant that the Government does not challenge Nelson's testimony as to the true scope of his grandfather operations. (See Appellant's Br. 9-10.) The Government's only argument is that such evidence should not be considered because (1) appellant, before the hearing examiner, took the position that the permit was unambiguous and (2) it was not reflected in the documentary evidence before the Commission when the permit was issued. Both of these objections have been shown to be without merit. The uncontroverted evidence shows that Nelson's grandfather business was not confined to the transportation of commodities which, at the time of their movement, were (or were intended to become) part of the stock in trade of a drug store, as the Commission now interprets appellant's permit. (R. 240.) And it is clear that the guaranty of the grandfather clause applies to the business in which the carrier was engaged—and not to particular operations under individual contracts. (Appellant's Br. 40-41.)

It cannot be doubted that the Commission's restrictive interpretation deprives appellant of the right to continue the kind of business which its predecessor was conducting during the grandfather period, in violation of the grandfather clause (Section 209(a)) of Part II of the Interstate Commerce Act.

II.

UNDER THE GUISE OF INTERPRETATION, THE COMMISSION HAS MODIFIED APPELLANT'S PERMIT IN VIOLATION OF SECTION 212(a) OF PART II OF THE INTERSTATE COMMERCE ACT.

The Government argues that its interpretation of the plain and unambiguous language, "*stock* in trade of drug stores," by applying the so-called intended use test, is reasonable and consistent with past decisions. (Br. 18-19, 22-26.) The Government further argues that, inasmuch as

such interpretation merely determines what rights appellant and its predecessor had "from the beginning," its action does not constitute a modification of the permit. (Br. 11-14.)

This argument, again, assumes that appellant either has no grandfather rights or that they are immaterial—an absurd position. Nevertheless, even if the only question in the case were one of construing the language of appellant's permit, we submit that the Commission's interpretation, by applying the intended use test, is clearly erroneous and effects an unauthorized modification of its operating authority just as surely as if the Commission had altered the commodity authorization to read: "*stock* in trade of drug stores, but only when part of (or intended to become part of) the stock in trade of a drug store."

A. The Commission's interpretation of "*stock* in trade of drug stores", by applying the intended use test, is clearly erroneous.

The largest section of our brief (pp. 23-36) was devoted to showing that (1) the intended use test, as a restrictive interpretive device, was unknown when appellant's predecessor's permit was issued in 1942, and (2) the intended use test cannot properly be applied in interpreting a commodity description by reference to place of *sale*, as distinguished from place or business of *use*. The Government has refused to discuss these arguments seriously and attempts to dismiss them summarily as "an extended discourse." (Br. 13.)

(1) Apparently, the Government's only answer to our argument that the intended use test was unknown as a restrictive interpretive device when the 1942 permit was issued is to state, without citation of authority, that the permit was issued on the basis of "intended use" (Br. 23) and to quote a self-serving statement from one of its 1954

decisions to the effect that commodities have been described by reference to their intended future use since the beginning of motor carrier regulation (Br. 22-23). We had thought that our brief showed clearly that this statement, if intended to be authority for the application of the intended use test, as a restrictive interpretive device, was clearly erroneous. (Br. 24-27.) The Government has not deigned to reply to our analysis. In fact, the earliest application of the intended use test cited by the Government is in a 1951 case (*Crouch—Modification of Certificate*, 53 M.C.C. 436), (Br. 23), whereas we traced the test back to a 1949 case (*England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567) (Br. 25).

We can only conclude that the Commission has no authority that "intended use" was known and understood as an implied limitation on commodity descriptions when Nelson's permit was issued in 1942. *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash. 1954) and *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955), discussed in detail, above, are persuasive authority that the Commission cannot restrictively interpret a permit or certificate in the light of refinements of definition or interpretation subsequently adopted.

(2) Apparently, the Government's only reply to our argument that the intended *use* test cannot be properly applied to a commodity description by reference to place of *sale* is to state that, if the Commission had intended to authorize the transportation of such commodities as are stocked and sold in drug stores, without requiring that they be earmarked to become part of the stock in trade of a drug store, it would have used the commodity description "'such merchandise as is dealt in by' drug stores"[*] instead of "*stock* in trade of drug stores." (Br. 25.)

[*] The Government's brief gives the impression that "such merchandise as is dealt in by *drug stores*" is a common and well understood commodity description. (Br. 25; italics supplied.) However, we know of no case in which such a commodity description was used.

We had thought that our brief conclusively showed that the Commission which issued appellant's permit considered "stock in trade of" synonymous with "such merchandise as is dealt in by" (Br. 31-33), and the Government does not attempt to refute our analysis. Moreover, it is astounding to find the Commission now taking the pious position that a "such merchandise as is dealt in by" commodity description is clearly a generic commodity description, containing no inherent intended use limitation! (Br. 25.) It was not long ago that the Commission sought to impose an intended use limitation on just such a commodity description. In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947), the court refused to grant the Commission's request for an injunction against the transportation of beer and beer containers from a brewery to a distributor where the commodities authorized in the permit were "*such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment*, *materials* and *supplies* used in the conduct of such business," because the court found that wholesale food business houses dealt in beer. Apparently the *Ratner* case taught the Commission a lesson, for it has since been careful not to attempt to imply intended use limitations in similar commodity authorizations. *Sanders Extension of Operations—Washington, D.C.*, 47 M.C.C. 210 (1947); *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953); *Archie's Motor Freight, Inc.—Interpretation of Certificate* (Docket No. MC-116008 (Sub. No. 1), decided October 3, 1957). Although the Commission was singularly unsuccessful in limiting, by interpretation, "such merchandise as is dealt in by" commodity descriptions, it is now trying to accomplish the same thing in "stock in trade of" commodity descriptions.

The Commission itself has indicated that the only appropriate limitation on a description of commodities by reference to the places where they are dealt in is a *Keystone* restriction, not an intended use limitation. *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949).

The Commission which issued Appellant's predecessor's permit in 1942 was well aware of the necessity for carefully delimiting the scope of grandfather permits and was also well aware of the possibilities of using a *Keystone* restriction to limit the scope of such broad generic commodity descriptions as appellant's—and yet no such limitation was imposed and none may be implied.[9] *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 499 (1939); *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

B. The Commission has attempted to accomplish by interpretation what it could not accomplish under Section 212(a) of Part II of the Interstate Commerce Act.

Under Section 212(a) of the Interstate Commerce Act, a permit can be suspended, changed, or revoked, in whole or in part, after notice and hearing, only for wilful failure to comply with the statute, with one of the Commission's orders or regulations, or with any term, condition, or limitation of the permit. (Appellant's Br. 3.) The Commission itself has held that to read into a certificate (or permit, as in this case) a limitation which was not inherent in the language when the certificate was originally granted would clearly constitute modification or partial revocation, by interpretation, in violation of Section 212(a). *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 302 (1948). The Government tries to distinguish *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947), on the ground that it involved an attempt by the Commission expressly to modify a *water common carrier's* certificate. (Br. 14.) Nevertheless, in the course of the opinion, this Court pointed out that *motor carrier certificates* can be revoked or modified only for one of the reasons specifically enumerated in Section 212(a), and if the *Seatrain* case

[9] The Government accuses us of arguing that the Commission has read into appellant's permit a *Keystone* restriction. (Br. 26.) However, appellant merely accuses the Commission of trying to accomplish the practical equivalent of a *Keystone* limitation by misapplying the intended use test. (Br. 34, particularly note 27.)

means anything it must stand for the proposition that the Commission cannot accomplish covertly, by interpretation, what it could not accomplish overtly under Section 212(a).

The only question, then, is whether or not the Commission's intended use interpretation of "*stock* in trade of drug stores" limits the scope of the transportation authorized by that phrase when Nelson's permit was issued in 1942.

That the superimposition of the intended use test on what would appear to be nothing more than a plain generic commodity description in fact alters the meaning of that commodity description is well illustrated by the Government's statement of the meaning of "*Stock* in trade of drug stores" (Br. 6):

> The Interstate Commerce Commission has construed that permit as *not* allowing appellant to transport such commodities as dried glue *for a manufacturer of gummed products* and automobile batteries *for department stores*.[10] (Italics supplied, in part.)

Surely it must be clear that the Commission has added something to a simple generic description of commodities when it circumscribes the consignors or consignees for whom such commodities may be transported. (Incidentally, the quoted statement also illustrates how closely the Commission's intended use limitation approximates a *Keystone* restriction.)

We believe we have shown—and the Government has not refuted—that the intended use limitation, as now applied by the Commission, could not have been inherent in

[10] The Government has stated its interpretation of "*stock* in trade of drug stores" in such a way as to give the impression that the only commodities in question are dried glue and automobile batteries which, at first blush, might appear to be clearly not included in the commodity description. Of course, other commodities, which everyone would agree are commonly stocked for sale by drug stores, were involved. (Appellant's Br. 7.) Moreover, the Commission has never questioned that any of the commodities involved, including dry glue and automobile batteries, were part of the stock in trade of drug stores (R. 241-242); indeed, no such position could be maintained under the evidence presented to the Commission (Appellant's Br. 7, note 3).

the phrase "*stock* in trade of drug stores" when Nelson's permit was issued in 1942 because (1) the intended use test, as an interpretative device, was unknown to the Commission and (2) even if it had been in existence, it would not have been applied to a commodity description by reference to place of sale, such as that contained in appellant's permit. The Commission's present attempt to read-in an intended use limitation constitutes an attempted modification of the permit, in violation of Section 212 (a), just as surely as if it had arbitrarily reopened the grandfather proceeding and changed the wording of the permit itself to read: "*stock* in trade of drug stores, but only when part of (or intended to become part of) the stock in trade of a drug store." Such subterfuge cannot be countenanced.

III.

APPELLANT'S DEFENSE OF THE COMMISSION'S EFFORTS TO CURTAIL ITS OPERATIONS DOES NOT CONSTITUTE A COLLATERAL ATTACK ON THE PROCEEDINGS IN WHICH ITS PERMIT WAS ISSUED.

The Government has tried to place appellant in the impossible position of claiming that the phrase "*stock* in trade of drug stores" in its permit covers all of the varied commodities transported by Andrew G. Nelson during the grandfather period. (Br. 10, 17, 31.) From this it argues that appellant's only remedy is to petition the Commission to reopen the grandfather proceedings to admit additional evidence and to issue a revised permit in accordance with that evidence. (Br. 31.)

Appellant has never taken such an extreme position, but has merely argued that, if its permit is not interpreted to permit the transportation of such commodities as are customarily held for sale by drug stores, regardless of

consignor, consignee, or ultimate destination,[11] the permit is not as broad as it was required to be by the grandfather clause and, consequently, the Commission was under a duty to reopen the grandfather proceedings and make the permit read as it should. (Br. 40, 43.) In addition, the Commission seems to forget that this is not a case in which appellant was the moving party and, therefore, should bear the risk of selecting the proper remedy. In this case, the Commission undertook to establish that appellant had been conducting unauthorized operations and sought to enjoin that activity. Appellant had no choice but to defend the Commission's action—and its only defenses could have been that the operations in question (1) were authorized by the unambiguous language of its permit or, in any event, (2) could not be enjoined because they were protected by the grandfather clause.

Fortunately, there is a precedent for appellant's position. In *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission entered a cease and desist order against the carrier's claim that the operations in question were no broader than his grandfather operations. In *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954), the Court remanded the case to the Commission for consideration of the grandfather evidence and in *Johnson Truck Service* v. *Salvino*, 63 M.C.C. 1 (1954), the Commission,

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[11] The Government distorts appellant's position when it states:

> * * * appellant argues that his permit allows him to transport dry glue to a manufacturer of gummed products on the theory that *some* drug stores sell glue. (Br. 19, Italics supplied.)
>
> The language [of applicant's permit] on its face lends no support to appellant's position that it may transport anything to anybody so long as an item similar to that transported *might* be sold in a drug store. (Br. 8, Italics supplied.)

Appellant has never taken such an extreme position; its position was clearly stated in its brief (p. 42):

> Under the commodity description "*stock* in trade of drug stores", as appellant interprets it, only such commodities as are customarily held for sale to customers by drug stores may be transported * * *.

pursuant to the remand, of its own volition, reopened the grandfather clause proceeding and sustained the carrier's contention by issuing a revised permit to authorize the questioned transportation. We find it somewhat incredible that the Commission takes the position that a defendant in proceedings before the Commission challenging the propriety of his operations should be required to petition for a reopening of the grandfather proceedings rather than to defend the Commission's action.

Appellant's defense in no way constitutes a collateral attack on the permit granted as a result of the grandfather proceedings. Appellant is perfectly content to operate under the permit as issued, so long as it is construed (1) in the light of circumstances and interpretative techniques which were known at the time it was issued and (2) in accordance with the evidence of its predecessor's grandfather operations. None of the cases referred to by the Commission in support of its collateral attack argument are applicable to the situation presented in this case. (Br. 31.) However, *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955) is in point. There, as here, the Commission argued that the carrier's position constituted a collateral attack on the grandfather proceedings, but the court held that there was no reason why the original certificate holder or his successors should have objected to the wording of the original certificate because they could not have known that the Commission would later adopt a restrictive definition of the term "groceries" and attempt to attack the successor's operations on the basis of that interpretation. The same reasoning applies in this case: after 1935, Nelson was hauling primarily for Walgreen (R. 154) and there was no reason why he should have objected to a permit which allowed him to haul stock in trade of drug stores, rather than the wide variety of commodities he had hauled during the grandfather period, so long as it was his under-

standing that he could transport stock in trade of drug stores without limitation as to consignor, consignee or ultimate destination.

IV.

IF APPELLANT'S VIEW OF THE REAL ISSUES BEFORE THE COMMISSION IS CORRECT, ITS ORDER IS NOT SUPPORTED BY ADEQUATE FINDINGS OR SUBSTANTIAL EVIDENCE.

The Government's argument that the Commission's order is supported by adequate findings and substantial evidence (Br. 26-29) fails to meet appellant's argument that it lacks such findings and evidence to support them because of the failure of the Commission to consider the evidence of Nelson's grandfather operations (Br. 44, 46-47). If appellant is correct in its argument that the Commission should have considered the grandfather evidence, either as an aid to interpretation or to show that the permit, as now interpreted by the Commission, is less broad than the grandfather clause guaranties, it must follow that the Commission's report lacks essential findings and its order is not supported by substantial evidence.

CONCLUSION.

The Government's brief does little more than rely upon the presumption of the correctness of its own administrative decision,[12] without discussing the real issues in this case as posed in appellant's brief. This omission is rather unfortunate because this case does involve substantial questions as to the scope of the Commission's power to effectuate its current policies under the guise of interpretation and to restrict the rights of grandfather carriers contrary to the guaranty of the grandfather clause of

[12] We should like to call the court's attention, once again, to the unusual procedure adopted by the Commission in attacking appellant's operations which now enables it to claim the benefit of the presumption of administrative correctness. (Appellant's Br. 45-46.)

Part II of the Interstate Commerce Act. We do not know why the Government has refused to meet these issues; nevertheless, we believe that they have been discussed in our briefs sufficiently to enable this Court to give them the consideration which they deserve.

We submit that the Commission's action in this case has violated appellant's rights both under its permit and under the grandfather clause of the Interstate Commerce Act and that the Commission should not be allowed to pull itself up by its bootstraps by relying on the presumption of administrative correctness in a procedure which it deliberately engineered for that purpose.

The Commission's cease and desist order should be held unlawful and set aside.

Respectfully submitted,

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